89-1183

No. _____

In The

Supreme Court Of The United States

OCTOBER TERM, 1989

ALFRED TRUMPOLD AND LINDA TRUMPOLD
Petitioners

v.

ROBERT BESCH AND THE DOUGLAS BATTERY CORPORATION
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF CONNECTICUT

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January 22, 1990

Printed by

Brescia's Printing Services, Inc.
66 Connecticut Boulevard
East Hartford, CT 06108
528-4254

QUESTIONS PRESENTED

1. In basing its decision on a critical fact that was not in the evidence, did the Appellate Court of the State of Connecticut violate petitioners' Fourteenth Amendment right to due process in an appeal, in conflict with decisions of the Supreme Court of the United States?

2. In this personal injury case, was the Fourteenth Amendment due process right to counsel violated by permitting defense counsel to ask questions about when a plaintiff called her lawyer; and in repeated questioning about the attorney-client contact, directed to events that the defense emphasized; and when the lawyer who was called was the lawyer who tried the plaintiffs' case before a jury?

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The petitioners, Alfred Trumpold and Linda Trumpold, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of the State of Connecticut, entered in the above-entitled proceeding on June 5, 1989.

OPINIONS BELOW

The opinion of the Appellate Court of the State of Connecticut is reported at 19 Conn. App. 22; 561 A.2d 438 (1989). The complete text of the opinion is printed in the Appendix at pages 1A-10A.

The unreported order of the Appellate Court denying the Motion for Reargument or Reconsideration is printed in the Appendix at page 11A.

The unreported order of the Supreme Court dated September 27, 1989, denying the petition for certification is printed in the Appendix at page 12A. The unreported order of the Supreme Court dated October 25, 1989, denying the motion for reconsideration is printed in the Appendix at page 13A.

JURISDICTION

The judgment of the Appellate Court of the State of Connecticut was entered on June 5, 1988, affirming the jury verdict and the trial court's denial of petitioner's post-trial motions. The Appellate Court denied a timely motion for reargument or reconsideration on July 6, 1989. Thereafter, the Supreme Court of the State of Connecticut denied a timely petition for certification on September 27, 1989, and a timely motion for reconsideration on October 25, 1989. This petition for certiorari is filed within ninety (90) days of the October 25, 1989 denial of the motion for reconsideration. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The due process clause of the Fourteenth Amendment to the Constitution of the United States is pertinent to a consideration of this petition. Section 1 of the Fourteenth Amendment is printed in the Appendix at page 17A.

STATEMENT OF THE CASE

A. CHRONOLOGY

This appeal arises from a personal injury action brought by the petitioners, Alfred and Linda Trumpold, husband and wife, against Robert Besch and the Douglas Battery Corporation, as the result of a light-impact automobile collision in Wallingford, Connecticut on July 21, 1981 at about 4:30 p.m., in which the Trumpold car was struck from behind by the Douglas Battery Corporation car operated by Mr. Besch.

After the collision Mr. and Mrs. Trumpold and their family went home. Linda called her father and the police. The Trumpolds then went to the emergency room at World War II Veterans Memorial Hospital in Meriden, arriving by 5:10 p.m., forty minutes after the collision. (T.[1] Linda Trumpold's video deposition, 6/8/87, shown to the jury, 7/21/87, p. 128; quoted at pages 4–5 of this petition); (Trial Exhibit O). The night of the collision Linda called Mr. Besch. The day after the collision, ("or the day after that"), she called her attorney, Richard Jacobs, who represented Mr. and Mrs. Trumpold at their jury trial. (T. Linda Trumpold's video deposition, pp. 4–5, *infra.)*

On July 22nd, the day after the collision, Linda and Alfred went to the Wallingford Police station, where Linda met with Officer Donald McNeil and with Mr. Besch. Linda reported that both she and Alfred had been injured. (Trial Exhibit M.) That morning Alfred Trumpold called in to work to say that he would be out.

On July 23, 1981, two days after the collision, Alfred and Linda Trumpold went to the office of Dr. Leonard Fasano, a general practitioner in New Haven, where they were both

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[1] "T" followed by the name of a witness, a date in 1987, and a number, refers to a page of the trial transcript.

treated. Alfred subsequently had two operations on his back. Both operating surgeons testified that Alfred's back problems and surgery after the collision were causally related to the collision. The defense's doctor testified that the collision "ignited" Alfred's back problems. Alfred had had back surgery before the accident by one of the surgeons who also operated on him after the accident, but at the time of the accident Alfred was fully employed as a machinist.

Alfred Trumpold's medical expenses came to $17,272.55. The present value of his lost earnings and fringe benefits, based on total and permanent disability, was $738,000.00. Mr. Trumpold has been receiving Social Security payments, retroactive to the summer of 1981, for total disability because of his low back condition.

Defense counsel interrogated Linda Trumpold about when she called her lawyer, Richard Jacobs:

Q. You left the scene of this accident and you went home?

A. Yes.

Q. And it was at that time when you got home that you called your father?

A. Yes.

Q. And you called the police department?

A. Yes. –

Q. Now, who else did you call?

A. I called — we went to the hospital first.

Q. All right. Who else did you call that night?

A. I called Mr. Besch.

Q. Who else did you call besides Mr. Besch?

A. I don't remember calling anyone else.

Q. Do you recall calling Mr. Jacobs that night or the day after?

A. It might have been the day after. I'm not sure, or the day after that.

Q. You don't know when you called Mr. Jacobs?

A. No, I don't remember exactly which — I don't think it was the day of the accident, though.

Q. You spoke with Mr. Jacobs before you went up to see the police, did you?

A. Yes, I did.

(T. Linda Trumpold, video deposition, p. 128.)

Objections to Linda Trumpold's video deposition were argued out of the presence of the jury (App. pp. 14A–16A). Attorney Jacobs objected to defense counsel's interrogating Mrs. Trumpold about when she called her lawyer, and whether that was before she went to the police station. The Appellate Court's opinion does not mention the objection to the question, "You spoke with Mr. Jacobs before you went to see the police, did you?" (19 Conn. App. 22, 25; App. p. 3A; 561 A.2d 438, 439; transcript of objections printed at App. pp. 14A–16A.) The plaintiffs claimed that the questions were not relevant and that they violated the attorney-client privilege.

Defense counsel later questioned Alfred Trumpold about when his wife called the lawyer:

Q. Okay. Then you got in your car and you drove home?

A. Yes, sir.

Q. When you got home, is it your testimony that your wife had started making calls to various people to get instructions about what she ought to do?

A. No sir.

Q. Did your wife call her father?

A. Yes sir.

Q. And who else did she call?

A. The police station.

Q. Who else did she call?

A. That's all I know before we went to the hospital.

Q. I see. Is it your recollection that she called Att. Jacobs that night or the next morning?

A. I don't —

[OBJECTION]

* * *

MR. ZEMETIS [defense counsel]: Alright [sic]. Your wife has testified that she called Att. Jacobs?

A. Yes sir.

Q. When did she call Att. Jacobs?

A. I don't remember sir.

Q. Do you remember if it was that night?

A. I don't think so.

Q. Do you remember if it was before you went to the hospital?

A. I don't believe so, no sir.

Q. Do you remember if it's when you came back from the hospital?

A. No sir, I think it was the next day after we got back from the police station.

Q. Your wife has said she called him before she went to the police station, is that your recollection or you don't recall?

A. I don't remember exactly sir.

Q. Alright [sic]. Is that before you called into work?

A. I called into work the morning of the 22nd.

Q. Before you called Mr. Jacobs or afterwards?

A. I don't remember.

(T. Alfred Trumpold, 7/19/87, pp. 67-69.)

The defense claimed in summation that when Alfred Trumpold called in to work the day after the accident he said he would be out "indefinitely." (T. Zemetis, summation, 8/15/87, p. 10.)

The jury found liability ninety percent to ten percent in favor of Alfred Trumpold, the driver. It found his total damages to be $1,650.12, and, applying the ten percent

reduction for comparative negligence, brought in a verdict for $1,485.10. There was a defendants' verdict on Linda Trumpold's claim for loss of consortium.

The plaintiffs filed a motion to set aside the verdict, a motion for additur, and a motion for a new trial. Oral argument on these motions was heard on December 18, 1987 by Judge Donald T. Dorsey. The motions were denied and judgment entered on February 1, 1988. The plaintiffs appealed to the Appellate Court of the State of Connecticut from the final judgment, the verdicts, and denial of the plaintiffs' post-trial motions, and sought a new trial on the issues of damages. The Appellate Court found no error:

> The plaintiffs argue that defense counsel asked these questions [about when the attorney was called] in order to encourage the jurors to infer that the plaintiffs' attorney guided them in pressing their claim to fullest advantage, and to play upon the public's mistrust of attorneys. The defendants counter that the testimony of the parties concerning the force of the impact of the colliding vehicles and the severity of resulting injury was so disparate that the jury was entitled to examine this testimony. The defendants contend that Alfred Trumpold could not have been and was not injured whereas Alfred Trumpold claims he was severely injured. The defendants argue that the court properly allowed the evidence because Linda Trumpold's actions following the accident tended to corroborate the defendant's version of the occurrence, because *Alfred Trumpold did not seek medical assistance immediately following the accident, but instead consulted an attorney.* [Emphasis supplied]

After reading the transcripts and considering all other relevant information, we agree with the defendants that *asking the plaintiffs when they first contacted their attorney following the accident was*

permissible on these particular facts. Under other factual circumstances, such evidence might be inadmissible. 19 Conn. App. 22, 26 (1989) (App. p. 4A); 561 A.2d 438, 440 [Emphasis supplied].

* * *

The trial court, in its discretion, could have concluded that the information was useful to the jury in assessing the parties' testimony concerning the nature of the accident, and on cross-examination the defendants were entitled to demonstrate to the jury apparent weaknesses in the plaintiffs' testimony educed during direct examination. The trial court did not abuse its discretion in making that evidentiary ruling and we do not find that injustice occurred as a result of that ruling. 19 Conn. App. 22, 27 (1989) (App. p. 5A) 561 A.2d 438, 440.

Nowhere in the trial record is there evidence that Alfred Trumpold consulted an attorney before seeking medical assistance. The factual circumstances were that the lawyer was called, at the earliest, the morning after the day of the accident. The Appellate Court's statement that the defendants argued that Mr. Trumpold consulted an attorney before seeking medical assistance is incorrect. The defendants did not argue that at any time.

Mr. and Mrs. Trumpold filed a motion for reargument or reconsideration by the Appellate Court, which was denied. They filed a petition for certification by the Supreme Court of the State of Connecticut from the Appellate Court's decision affirming the jury verdict. That petition was denied. They filed a motion for reconsideration of the petition for certification. In plaintiffs' memorandum in support of this last motion they asked that the defendants in their statement in opposition point out the place in the record where there was evidence that Alfred Trumpold consulted an attorney before seeking medical assistance. The defendants did not respond to this request. The motion for reconsideration was denied.

B. HOW THE FEDERAL QUESTIONS WERE RAISED

1. Fourteenth Amendment Due Process In An Appeal: Right Not To Have Appeal Decided On Non-Existent Facts

The plaintiffs filed a motion for reargument or reconsideration by the Appellate Court, claiming that the opinion of the Appellate Court is in error in the following respects:

1. Holding that the evidence supported a finding that Linda Trumpold's calling a lawyer the day after the accident tended to corroborate the defendant's version of the occurrence and was a basis for impeaching credibility.

2. In holding that the evidence supported a finding that Alfred Trumpold did not seek medical assistance immediately following the accident but instead consulted a lawyer.

3. In misconstruing the evidence, as cited in paragraphs 1 and 2, above, the Appellate Court has decided the case on a set of facts not supported by the evidence, thus depriving the plaintiffs-appellants of due process of law, in violation of Article I, Section 10 of the Constitution of the State of Connecticut and the Fourteenth Amendment to the Constitution of the United States.

Plaintiffs' memorandum of law in support of motion for reargument or reconsideration argued these points.

The plaintiffs filed a petition for certification to the Supreme Court of the State of Connecticut. One of the questions on which certification was sought was:

(D) Did the appellate court violate the plaintiffs' due process rights (U.S. Constitution, Fourteenth Amendment; Connecticut Constitution, Article I, § 10) in an appeal:

1. In holding that the record supported a finding that Alfred Trumpold did not seek medical assistance immediately following the accident but instead consulted a lawyer?

Plaintiff's memorandum of law in support of the petition argued this issue.

The plaintiffs filed a motion for reconsideration of the petition for certification by the Supreme Court of the State of Connecticut, claiming that the opinion of the Appellate Court is in error in the following respects:

1. In holding that the evidence supported a finding that Alfred Trumpold did not seek medical assistance immediately following the accident but instead consulted a lawyer, thus depriving the plaintiffs-appellants of due process of law, in violation of Article I, Section 10 of the Constitution of the State of Connecticut and the Fourteenth Amendment to the Constitution of the United States.

2. In holding that the evidence supported a finding that Linda Trumpold's calling a lawyer the day after the accident tended to corroborate the defendant's version of the occurrence [accident] and was a basis for impeaching credibility, thus depriving the plaintiffs of due process of law in violation of Article I, Section 10 of the Constitution of the State of Connecticut and the Fourteenth Amendment to the Constitution of the United States.

In their memorandum in support of that motion to reconsider the plaintiffs stated:

> The United States Supreme Court has held that due process forbids a court to find critical facts without evidence. *Creswill v. Knights of Pythias,* 225 U.S. 246

(1912); *Fiske v. Kansas*, 244 U.S. 380 (1926); *Sterling v. Constantin*, 287 U.S. 378 (1932); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976). See Stern, Gressman & Shapiro, *Supreme Court Practice* § 3.29 (6th ed. 1986).

2. Fourteenth Amendment Due Process: Right To Counsel

The plaintiffs first raised the claim that the questions as to when the lawyer was first contacted violated the constitutional right to counsel in their brief in support of their motions to set aside verdict, for additur and for new trial:

> Whatever the public may think of lawyers, a person's right to consult and retain a lawyer is cherished in our country. This right is constitutionally protected. (Page 38)

In their brief on appeal to the Connecticut Appellate Court on the plaintiffs' claim that "Violating the Attorney Client Privilege Impinges on the Constitutional Right to Counsel," citing Fifth and Fourteenth Amendment Due Process. (Page 8.)

> Permitting questions to witnesses and comments in argument about whether and when a party consulted an attorney violates the attorney-client privilege and impinges on the right to counsel. (Page 9)

The issue of due process right to counsel was also stated in plaintiffs' reply brief.

The Appellate Court opinion states:

> In light of our holding that defense counsel's questions did not abridge the plaintiffs' attorney-client privilege, we decline to examine the plaintiffs'

argument that, because their privilege was violated, so were their state and federal constitutional rights to counsel. 19 Conn. App. 22, 28 footnote *4* (App. p. 6A); 561 A.2d 438, 441.

The petition to the Connecticut Supreme Court for certification asked:

(A) Was the attorney-client privilege violated by defense counsel asking when a plaintiff contacted an attorney, and directing that questioning to events the defense emphasized in summation?

(B) Did questions asking when the lawyer was contacted violate due process and constitutional rights to counsel (U.S. Constitution, Fourteenth Amendment; Connecticut Constitution, Article I, § 10)?

REASONS FOR GRANTING THE WRIT

I. IN BASING ITS OPINION ON THE NONEXISTENT CRITICAL "FACT" THAT ALFRED TRUMPOLD CALLED A LAWYER BEFORE GOING TO THE HOSPITAL, THE APPELLATE COURT VIOLATED PETITIONERS' FOURTEENTH AMENDMENT DUE PROCESS RIGHTS, IN CONFLICT WITH DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

A. A Critical Fact Not In The Evidence

The Supreme Court of the United States has held that due process forbids a court to find critical facts without evidence. *Creswill v. Knights of Pythias*, 225 U.S. 246, 261 (1912); *Fiske v. Kansas*, 244 U.S. 380, 385 (1926); *Time, Inc. v. Firestone*, 424 U.S. 448, 463 (1976). See Stern, Gressman & Shapiro, *Supreme Court Practice* § 3.29 pp. 185-187 (6th ed. 1986).

> While it is true that upon a writ of error to a state court we [Supreme Court] do not review findings of fact, nevertheless two propositions are as well settled as the rule itself, as follows: (a) that where a Federal right has been denied as the result of a finding of fact which it is contended there was no evidence whatever to support and the evidence is in the record the resulting question of law is open for decision . . . *Creswill*, 225 U.S. at 261.

In *Trumpold* the Appellate Court's decision denied the plaintiffs the federal right of due process of law under the Fourteenth Amendment. The plaintiffs made this claim in their motion for reargument or reconsideration in the Appellate Court, in the petition for certification to the Supreme Court of the State of Connecticut, and in the motion for rehearing of that petition.

The Appellate court has held that the jury in *Trumpold* could have found that Alfred Trumpold did not seek medical assistance immediately following the accident, but instead consulted an attorney. 19 Conn. App. 22, 26; App. p. 4A; pp. 8-9, *supra*). There was no evidence that that was what Mr. Trumpold did. He was logged into the hospital emergency room forty-five minutes after the accident, his wife five minutes earlier. The lawyer was called no earlier than the next day. Although the Supreme Court of the United States generally accords great deference to the findings of fact in state courts,

> . . . that deference is predicated on our belief that at some point in the state proceedings some fact-finder has made a conscious determination of the existence or nonexistence of the critical fact. Here the record before us affords no basis for such a conclusion. *Time v. Firestone*, 424 U.S. 448, 463.

In *Trumpold*, as in *Time*, the record affords no basis for the critical finding that the Trumpolds called their attorney before seeking medical assistance. Such a finding without evidence to support it violated Alfred and Linda Trumpold's right to Fourteenth Amendment due process. The Appellate Court's holding conflicts with the Supreme Court cases cited above. The *Trumpold* holding is not just an appellate ruling that is not supported by the trial record. It is the Appellate Court's distortion of the facts that are in the trial record.

Every litigant, civil and criminal, in a state court has the Fourteenth Amendment due process right to have their case decided on the facts in evidence. This applies to facts found by juries and courts. *Creswill v. Knights of Pythias*, 225 U.S. 246, 261 (1912); *Thompson v. City of Louisville*, 362 U.S. 199 (1960); *Vachon v. New Hampshire*, 414 U.S. 478, 479-80 (1974).

The integrity of the appellate process requires that an appellate court base its opinion on the true facts. Fourteenth Amendment due process requires this. To allow the Appellate Court's holding in this case to stand would deprive Alfred and Linda Trumpold of due process of law. It would subject all who come to courts of appeal after them to the risk of having their appeal decided on false facts. The real law to come out of *Trumpold* would not be in the case reports. That law would be that an appellate court can base its decision on non-existent facts, and nobody will ever know.

Trumpold will be precedent. Judges and lawyers will sift through its facts. *Trumpold* will be cited for the proposition that if you call a lawyer before getting medical attention after an accident, then defense counsel can ask when you called a lawyer. The Constitution of the United States does not countenance case precedents based on fiction.

The Appellate Court wrote, "under other factual circumstances such evidence [of the attorney-client contact] might be inadmissible." (19 Conn. App. 22, 26, pp. 8–9, *supra*); (App. p. 4A), 561 A.2d 438, 440. Due process mandates that that court be required to decide the issue of the admissibility of that evidence under the factual circumstances that did exist in *Trumpold*. In requiring this, the Supreme Court of the United States will give guidance to the lower courts.

The effect on the law in our country of letting stand the Appellate Court's decision based on a non-fact, would be to permit appellate courts through mistake to remake the trial evidence, and by their silence to cause properly raised constitutional issues to vanish. This should shake the people's faith in the fairness of our system of justice. But the people would never know. That is what is worse.

The plaintiffs pointed out to the Appellate Court that it had made a serious error, one that deprived them of due process of law under the Constitution of the United States

and the Constitution of the State of Connecticut. The Appellate Court refused to consider its mistake. The Supreme Court of the State of Connecticut declined to exercise its discretion to hear the issue.

May the Supreme Court of the United States proclaim throughout the land its reaffirmation of the due process right to have your appeal decided on the true facts! In doing so, may the Court send word to every other court in our country that it will not sanction the negation of this right by a court's refusing to acknowledge that it has misstated the facts and by that court's refusing to give a hearing to the claim that that constitutional right has been violated!

B. Error In Appellate Court's Relevancy Ruling Caused By The False Fact

The Appellate Court has held that the inquiry as to when the lawyer was called was relevant (1) To corroborate the defendants' version of the occurrence; (2) to impeach the plaintiffs' credibility as witnesses (19 Conn. App. 22, 26-27; App. pp. 4A-5A; pp. 8-9, *supra;* 561 A.2d 438, 440). This holding was based on the erroneous conclusion that there was evidence that a lawyer was called in the forty minutes between the time of the accident and the time when Mr. and Mrs. Trumpold were in the emergency room. The holding on relevancy is rooted in the Appellate Court's misstatement of the evidence and is thus contaminated by the same deprivation of due process.

The true facts invalidate the Appellate Court's relevancy holding. Evidence that Linda Trumpold called her lawyer the day after the accident did not tend to corroborate the defendant's version of the occurrence, and was not a basis for impeaching the credibility of either Linda or Alfred Trumpold. (19 Conn. App. 22, 26; App. p. 4A; 561 A.2d 438, 440).

That Linda Trumpold called her lawyer the day after the accident in no way corroborates Mr. Besch's version of the occurrence. Only a view that there is something dishonest about calling a lawyer could lead to such a suspicion. And that suspicion would be a general one. It would not relate to any specific facts. It would tell nothing about the force of the impact. It would not tend to prove "that Alfred Trumpold could not have been and was not injured." 19 Conn. App. 22, 26; App. p. 4A; p. 8, *supra*, 561 A.2d 438, 440.

The Appellate Court holds that questioning Linda and Alfred Trumpold about when Linda called a lawyer was proper impeachment, presumably of the credibility of both Trumpolds. 19 Conn. App. 22, 26-27; (App. pp. 4A-5A); 561 A.2d 438, 440. Exercising the constitutional right to consult a lawyer cannot be grounds for testimonial impeachment. No negative inference can be permitted to be drawn from that act. See *Griffin v. California*, 380 U.S. 609, 614 (1965), holding that allowing comments on the exercise of the privilege against self-incrimination "cut down on the privilege by making its assertion costly."

Mrs. Trumpold was asked if she spoke with Attorney Jacobs before she went to see the police. Mr. Trumpold was asked if Linda's call to Attorney Jacobs was made before Mr. Trumpold called in to work the day after the accident and said he could not come to work, when he allegedly said that he would be out of work "indefinitely." (T. Alfred Trumpold 7/29/87, p. 71; T. Zemetis Summation, 8/5/87, p. 10. Defense counsel in his summation tried to make the jury think there was a causal relationship between the attorney-client conversation and Linda Trumpold's deciding to go to the police station, and what she did there. He tried to make the jury think there was a causal relationship between the attorney-client conversation and the substance of Mr. Trumpold's phone call to his employer, in which the defendants claimed he said he would be out "indefinitely."

The Supreme Court of the United States does not ordinarily review evidentiary rulings of lower courts. *Cleveland & Railway Co. v. Backus*, 154 U.S. 439, 443 (1893); *United States v. Johnston*, 268 U.S. 220, 227 (1924); *Hamling v. United States*, 418 U.S. 87, 124 (1974). But there comes a point where the ruling so offends logic and reason as to violate the due process clause of the Fourteenth Amendment. At that point the Supreme Court of the United States should intervene.

II. PETITIONERS' FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO COUNSEL WAS VIOLATED BY PERMITTING DEFENSE COUNSEL TO ASK LINDA TRUMPOLD WHEN SHE CALLED A LAWYER, AND WHETHER THAT WAS BEFORE SHE WENT TO THE POLICE STATION; AND TO ASK HER HUSBAND ALFRED WHETHER THE LAWYER WAS CALLED BEFORE ALFRED CALLED IN TO WORK AND SAID AT THAT TIME THAT HE WOULD BE OUT, AS THE DEFENDANTS CLAIM, "INDEFINITELY;" AND WHEN THE LAWYER WHO WAS CALLED WAS THE LAWYER WHO TRIED PETITIONERS' CASE TO THE JURY.

The Supreme Court of the United States has said that the right to counsel in civil litigation is implicit in the concept of due process. *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

Federal courts of appeal have spoken on this issue. In both criminal and civil cases ". . . the right to counsel is one of constitutional dimensions and should thus be freely exercised without impingement." *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1118 (5th Cir.) *cert. denied*, 449 U.S. 820 (1980). In holding that the right to consult counsel attaches to the right to meaningful access to the courts: "[W]hile private parties must ordinarily pay their own legal fees, they have an undeniable right to retain counsel to

ascertain their rights." *Martin v. Lauer*, 686 F.2d 24, 32 (D.C. Cir. 1982).

Permitting questions to witnesses and comments in argument about whether and when a party consulted an attorney violates the attorney-client privilege and impinges on the right to counsel. In *Trumpold*, asking these questions repeatedly of a plaintiff, and even embellishing by asking, "Do you remember if [you called your attorney] that night?" "Do you remember if it was before you went to the hospital?" "Do you remember if it's when you came back from the hospital?" "[B]efore you called into work?" as defense counsel asked Alfred Trumpold (T. Alfred Trumpold, 7/29/87, pp. 67-69; p. 7, *supra*), must not be permitted, because this practice impinges on the right to consult counsel. No fair impeachment can arise from the fact that someone sought legal advice. People must not be discouraged from seeking counsel shortly after being injured, for fear of having the fact that they contacted a lawyer early on used against them at trial.

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. As we stated last Term in *Trammel v. United States*, 445 U.S. 40, 51 (1980): "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." And in *Fisher v. United States*, 425 U.S. 391, 403 (1976), we recognized the purpose of the privilege to be "to encourage clients to make full disclosure to

> their attorneys." This rationale for the privilege has long been recognized by the Court, see *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure").

Upjohn Co. v. U.S., 449 U.S. 383, 389 (1981).

The privilege that protects confidential communications between attorney and client has to extend to protecting the initial time and place and any other information about the act of contacting an attorney. Otherwise, defense counsel can, as he did in this case, make an argument based not on inference, but on suspicion and conjecture. Defense counsel in *Trumpold* should not have been permitted to place in the minds of jurors questions about what went on between the client and the attorney that could only be rebutted by the client or the lawyer's testifying as to what their conversation was. One of the reasons for the privilege is to preserve the lawyer as an effective advocate by keeping the lawyer off the witness stand. The relationship between the client and the attorney was made an issue in *Trumpold*. To do that violated the Fourteenth Amendment due process right to counsel. How can counsel be effective when the jury before whom the lawyer is trying the case hears questioning about when that lawyer was called, with reference to events with which the defense sought to prove that the plaintiffs fabricated a case? There is no way the lawyer can defend himself/herself against this attack. The client's cause suffers.

The theme of the defendants' case was that there was a slight rear end collision and that the plaintiffs concocted a claim. The numerous references to contacting an attorney were artfully made to imply that something improper

occurred between the plaintiffs' attorney and his clients, thus playing upon the public's mistrust of lawyers.

> Because our law is clear that the privilege applies only to "information born of confidential communication," we decline to hold that the trial court's evidentiary ruling that permitted defense counsel to ask the plaintiffs, as witnesses, when they first contacted their attorney violated the confidentiality of their privileged communications. Therefore, defense counsel's summation remarks alluding to the plaintiffs' contacting their attorney did not violate the privilege. 19 Conn. App. 22, 28 (App. p. 6A).

The attorney-client contact, speculation as to the content of the privileged communication, and conjecture that the plaintiffs did things as the result of it, were the keystone of the defense strategy. (T. Zemetis, 8/15/87, Summation, p. 10 (call to employer), p. 20 (choice of doctor), p. 28 (choice of doctor). Defense counsel questioned Linda to make it appear that she was hiding something (pp. 4–5, *supra*). He asked Alfred question after question about when the lawyer was called (p. 6–7, *supra*). This clever strategy resulted in the plaintiffs being represented by a lawyer who had to try the case before a jury before whom his role and his conduct had been put in question. Only by disclosing the content of the privileged communication could what went on between client and attorney be explained. Then the question in the jury's mind would be, "Is this person telling us the truth about what went on in that conversation?" Alfred and Linda Trumpold's right to counsel was "cut down on" *Griffin v. California*, 380 U.S. 609, 614 (1965).

For a lawyer to try to win a case by playing to people's dislike for and mistrust of lawyers is unworthy of our great profession. This practice would seem to confirm what much of the public thinks of us.

When their lawyer and their contact with him were made an issue in this case, Alfred and Linda Trumpold's Fourteenth Amendment due process right to counsel was violated. The Supreme Court of the United States should put an end to this practice of undermining that precious right.

CONCLUSION

For the reasons stated above, this petition for certiorari should be granted.

Respectfully submitted,

RICHARD L. JACOBS
Counsel of Record
JOHN M. SHANNON
JACOBS, VOTRE &
JACOBS, P.C.
265 Orange Street
New Haven, Connecticut 06510
(203) 562-6111
Counsel for Petitioners

No. _____

In The

Supreme Court Of The United States

OCTOBER TERM, 1989

ALFRED TRUMPOLD AND LINDA TRUMPOLD
Petitioners

v.

ROBERT BESCH AND THE DOUGLAS BATTERY CORPORATION
Respondents

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF CONNECTICUT

APPENDIX TABLE OF CONTENTS

Action to recover damages for personal injuries sustained by the named plaintiff in a motor vehicle accident allegedly caused by the defendants' negligence, and for other relief, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *Dorsey, J.*; verdict and judgment in favor of the named plaintiff, from which the plaintiffs appealed to this court. *No error.*

Richard L. Jacobs, with whom were *Ina L. Silverman*, *John M. Shannon*, legal intern, and, on the brief, *Steven D. Jacobs*, for the appellants (plaintiffs).

William F. Gallagher, with whom were *Terence A. Zemetis* and, on the brief, *Elizabeth A. Gallagher*, for the appellees (defendants).

JACOBSON, J. This is a negligence action brought in 1983 by Alfred Trumpold, claiming damages for injuries he sustained in an automobile accident, and by his wife, Linda, for loss of consortium.[1] The complaint alleged that an automobile, owned by the defendant Douglas Battery Corporation and driven by the named defendant, collided with the rear of the plaintiffs' vehicle while it was stopped at a traffic light. The defendants' answer included a special defense of contributory negligence.

The jury returned a verdict for Alfred Trumpold, finding the defendants 90 percent negligent and Alfred Trumpold 10 percent negligent, and awarding him a total of $1485.10. The jury also returned a verdict for Linda Trumpold, but awarded zero damages. After the trial court ordered the jurors to reconsider their verdicts, they returned with the same verdict and award

[1] Linda Trumpold's claim for damages for injuries was removed from the jury's consideration by the court because she failed to establish that she had sustained expenses in excess of $400, as required by General Statutes § 38-323.

for Alfred Trumpold but changed their verdict as to Linda Trumpold to a verdict for the defendants. The plaintiffs moved to set aside the verdict, for a new trial, and for additur. After oral argument, the court denied the motions and rendered judgment in accordance with the verdicts.

The plaintiffs appeal from the judgment rendered on the verdicts and from the trial court's denial of their posttrial motions, claiming that the trial court erred (1) in permitting defense counsel to ask allegedly improper questions of the plaintiffs during trial and to refer to that testimony during summation, (2) in making an improper remark while instructing the jury, (3) in permitting defense counsel to make other improper, inflammatory and prejudicial remarks to the jury during summation, and (4) in rendering judgment on the jury's verdicts because they were against the weight of the evidence. We find no error.

The plaintiffs' initial claim is that the trial court erred when it permitted defense counsel to ask the plaintiffs when they had first contacted an attorney after the accident. The essence of their argument is that once the plaintiffs testified that they had contacted their attorney soon after the accident, the jury would believe that something improper had transpired with regard to the plaintiffs' pursuit of their claims in court. They argue that the questions were irrelevant, and that defense counsel's reference to the plaintiffs' responses to the questions during summation invaded the attorney-client privilege and violated their federal and state constitutional rights to counsel. We disagree.

First, turning to whether the trial court erred in permitting the questions over objection because they were irrelevant, we note at the outset that trial courts are given broad discretion in determining the relevancy of evidence; *State* v. *Boucino,* 199 Conn. 207, 225, 506

A.2d 125 (1986); and that their "rulings will be reversed [only] if the court has abused its discretion or where injustice appears to have been done." *State* v. *Echols*, 203 Conn. 385, 393, 524 A.2d 1143 (1987), citing *State* v. *Smith*, 198 Conn. 147, 157, 502 A.2d 874 (1985); *State* v. *Johnson*, 190 Conn. 541, 548–49, 461 A.2d 981 (1983).

"Evidence is relevant only when it tends to establish the existence of a material fact in issue or to corroborate other direct evidence in the case." *State* v. *Talton*, 197 Conn. 280, 285, 497 A.2d 35 (1985). " ' "Unless excluded by some rule or principle of law, any fact may be proved which logically tends to aid the trier in the determination of the issue. Evidence is admitted, not because it is shown to be competent, but because it is not shown to be incompetent. No precise and universal test of relevancy is furnished by the law, and the question must be determined in each case according to the teachings of reason and judicial experience." *Pope Foundation, Inc.* v. *New York, N.H. & H.R. Co.*, 106 Conn. 423, 435, 138 A. 444 [1927].' *State* v. *Towles*, 155 Conn. 516, 523, 235 A.2d 639 (1967)." *State* v. *Echols*, supra.

The following additional facts are relevant to this claim. During the trial, the jury reviewed a videotaped deposition of Linda Trumpold.[2] Before it was shown to the jury, counsel for the plaintiffs argued to the court, out of the presence of the jury, that defense counsel's cross-examination question, "Did you call Mr. Jacobs that night [after the accident] or the day after?" was irrelevant and the court should not allow the jury to review that portion of the videotape. The court overruled the objection and the jury reviewed that testimony. The plaintiffs argue that similar, improper questioning by defense counsel occurred during his cross-examination of the plaintiff Alfred Trumpold

[2] Linda Trumpold suffered from agoraphobia and could not testify in court.

when he asked, "Is it your recollection that [your wife Linda] called Attorney Jacobs that night or the next morning?"

The plaintiffs argue that defense counsel asked these questions in order to encourage the jurors to infer that the plaintiffs' attorney guided them in pressing their claim to fullest advantage, and to play upon the public's mistrust of attorneys. The defendants counter that the testimony of the parties concerning the force of the impact of the colliding vehicles and the severity of resulting injury was so disparate that the jury was entitled to examine this testimony. The defendants contend that Alfred Trumpold could not have been and was not injured whereas Alfred Trumpold claims he was severely injured. The defendants argue that the court properly allowed the evidence because Linda Trumpold's actions following the accident tended to corroborate the defendants' version of the occurrence, because Alfred Trumpold did not seek medical assistance immediately following the accident, but instead consulted an attorney.

After reading the transcripts and considering all other relevant information, we agree with the defendants that asking the plaintiffs when they first contacted their attorney following the accident was permissible on these particular facts. Under other factual circumstances, such evidence might be inadmissible.

"The trial court enjoys a liberal discretion in fixing the limits of cross-examination, particularly if it affects credibility. *State* v. *Croom*, 166 Conn. 226, 231, 348 A.2d 556 (1974); *State* v. *Marquez*, 160 Conn. 47, 52, 273 A.2d 689 (1970)." *State* v. *Ouelette*, 190 Conn. 84, 101–102, 459 A.2d 1005 (1983). "Cross-examination, in quest for the truth, provides a means for discrediting the testimony of a witness. 'When pursued for that purpose, the examination frequently and legitimately

enters into matters collateral to the main issues.' *Hirsch* v. *Vegiard*, 137 Conn. 302, 304, 77 A.2d 85 (1950). . . . Given that function of cross-examination in shedding light on the credibility of the witness' direct testimony, '[t]he test of relevancy is not whether the answer sought will elucidate any of the main issues, but whether it will to a useful extent aid the court or jury in appraising the credibility of the witness and assessing the probative value of the direct testimony.' McCormick, Evidence (2d Ed.) § 29." *State* v. *Oulette*, supra, 102.

The trial court, in its discretion, could have concluded that the information was useful to the jury in assessing the parties' testimony concerning the nature of the accident, and on cross-examination the defendants were entitled to demonstrate to the jury apparent weaknesses in the plaintiffs' testimony educed during direct examination. The trial court did not abuse its discretion in making that evidentiary ruling and we do not find that injustice occurred as a result of that ruling.

The plaintiffs next argue that, during defense counsel's summation to the jury, reference to the plaintiffs' having called an attorney violated the attorney-client privilege.[3] They cite *Rienzo* v. *Santangelo*, 160 Conn. 391, 396, 279 A.2d 565 (1971), which held, in the specific factual context of that case, that a court's ordering a witness to answer the question "Did you tell your attorney where on the premises this accident occurred?" improperly invaded the scope of the privilege.

[3] The plaintiffs take issue, inter alia, with the following language: "Now, what they do from that scene of the accident I think is important. They drive home, they sit down and they start calling people. And among the people they call that evening or the next morning are the grandfather, apparently and it's assumed, and they call the police station and they call their lawyer."

In *State* v. *Manning*, 162 Conn. 112, 120, 291 A.2d 750 (1971), our Supreme Court held that Connecticut "is in accord with the majority rule that the [attorney-client] privilege does not extend beyond communications"; therefore, "an attorney is not bound to remain silent as to all information regarding his client, but only as to that information born of confidential communication." Id., 121. Additionally, "since the privilege tends to prevent a full disclosure of the truth in court, it will be strictly construed. *Turner's Appeal*, 72 Conn. 305, 318, 44 A. 310 (1899)." C. Tait & J. LaPlante, Connecticut Evidence (2d Ed.) § 12.5.1, p. 442; 2 B. Holden & J. Daly, Connecticut Evidence (2d Ed.) § 126d, pp. 1304–1305. Because our law is clear that the privilege applies only to "information born of confidential communication," we decline to hold that the trial court's evidentiary ruling that permitted defense counsel to ask the plaintiffs, as witnesses, when they first contacted their attorney violated the confidentiality of their privileged communications.[4] Therefore, defense counsel's summation remarks alluding to the plaintiffs' contacting their attorney did not violate the privilege.

The next claim of error proffered by the plaintiffs concerns an alleged impropriety in the trial court's charge to the jury. They argue that the court's comment to the jury at the close of its charge, that "you have some difficult issues to resolve,"[5] constituted

[4] In light of our holding that defense counsel's questions did not abridge the plaintiffs' attorney-client privilege, we decline to examine the plaintiffs' argument that, because their privilege was violated, so were their state and federal constitutional rights to counsel.

[5] The court made the remark in the following context: "Well, ladies and gentlemen, believe it or not I've gone through my outline and as far as I know I have not missed anything in my outline. I am going to let you go to lunch now. It's a quarter to two. I'll expect to be back at a quarter to three. And I may or may not have something else to say to you after I've talked to the attorneys. They are my monitors. They listen to what I have to say. If they think I made a mistake they are going to tell me about them. And if I think i made a mistake and I agree with them, I will tell you about

prejudicial error because, the plaintiffs contend, the case actually was simple, and the court's comment was prejudicial to them because it altered the burden of proof to the defendants' benefit. We disagree.

Our examination of the court's charge, in its entirety, leads us to conclude that the court did not err by stating that the jury had some difficult issues to resolve. The primary function of the charge to the jury is to assist them in applying the law correctly to the facts that they find to be established. *Magnon* v. *Glickman*, 185 Conn. 234, 244, 440 A.2d 909 (1981). Our Supreme Court has long held that courts are authorized to comment on evidence when charging the jury; *Heslin* v. *Malone*, 116 Conn. 471, 477, 165 A. 594 (1933); provided they do not misstate facts or evidence, and provided the comment is reasonable and fair. Id.; *Ladd* v. *Burdge*, 132 Conn. 296, 298, 43 A.2d 752 (1945). We do not view the comment as unreasonable or unfair; rather, it was within the trial court's discretion to make such a statement to emphasize to the jurors the seriousness of the factual questions they were to resolve.[6] This claim is without merit.

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it, but I don't think I made a mistake. I won't tell you about it, but we do that because we want to carefully present the case to you. As both attorneys have said they both waited a long time for you to decide this case. And we want to give it to you in the best fashion we can. I join with the attorneys and thank you for the attention that you have given to the case. It's been an unusually long case. And you have been very attentive. You have some difficult issues to resolve. I hope I've pointed them out to you so that you don't waste your time on insubstantial issues and you get right to the heart of the matter, and you follow the procedure that I have suggested to you."

[6] We find credence in the the trial court's explanation for the remark, when it responded to the plaintiffs' claim of error in its memorandum of decision denying the plaintiffs' posttrial motions: "Looked at in the light of the evidence of [Alfred Trumpold's] preexisting serious back injury, a preexisting permanent disability, a long period of convalescence prior to returning to work [before the accident at issue in this case occurred] and a contradictory work history after returning to work after [a] disc operation, the jury did indeed have '*serious issues*' of fact to resolve in Alfred Trumpold's case." (Emphasis in original.)

The plaintiffs' third claim of error is that the trial court erred in allowing defense counsel to give a summation that was improper, inflammatory and prejudicial. Essentially, the plaintiffs argue that during closing argument, defense counsel drew attenuated inferences from testimony heard earlier, attempting to persuade the jury that the plaintiffs had exaggerated the extent of their injuries from the accident.

The transcript reveals that the plaintiffs failed to object during defense counsel's summation. In addition, the plaintiffs failed to request a curative instruction by the trial court. "The absence of any objection or exception to improper argument, which we may infer from the absence of any such indication in the transcript, has . . . been regarded as a waiver of the right to press such a claim of error." *State* v. *Austin*, 195 Conn. 496, 504-505, 488 A.2d 1250 (1985), citing *State* v. *Vitale*, 190 Conn. 219, 226, 460 A.2d 961 (1983); *Cascella* v. *Jay James Camera Shop, Inc.*, 147 Conn. 337, 343, 160 A.2d 899 (1960). See 1 B. Holden & J. Daly, Connecticut Evidence (2d Ed.) § 12, p. 76. The failure to object to the remarks at the time they were made or at the close of argument constitutes a waiver of the plaintiffs' right to press this claim of error.

We reach this result after examining the plaintiffs' argument, raised for the first time in their reply brief, that the trial court's failure to limit defense counsel's allegedly improper comments constituted plain error.[7] Plain error review is not warranted because the error complained of does not pose one of those " 'truly extraordinary situations where the existence of the error is so obvious that it affects the fairness and integ-

[7] Practice Book § 4185 provides in relevant part: "The supreme court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. The supreme court may in the interests of justice notice plain error not brought to the attention of the trial court."

rity of and public confidence in the judicial proceedings.' *State* v. *Hinckley*, 198 Conn. 77, 87–88, 502 A.2d 388 (1985); *Hartford Federal Savings & Loan Assn.* v. *Tucker*, 181 Conn. 607, 609, 436 A.2d 1259, cert. denied, 449 U.S. 956, 101 S. Ct. 363, 66 L. Ed. 2d 221 (1980)." *Smith* v. *Czescel*, 12 Conn. App. 558, 563, 533 A.2d 223, cert. denied, 206 Conn.803, 535 A2d 131 (1987).

The final claim advanced by the plaintiffs is that the trial court erred in rendering judgment in accordance with the verdict, because the verdict was against the weight of the evidence. We do not agree.

The plaintiffs, in their brief, list with particularity those elements of the testimony they believe the jury should have accepted. Our review of the record and transcripts, however, indicates that the jury had more than sufficient evidence on which to base its verdict and to apportion damages as it did.

"As we have noted before, '[t]here are serious constitutional issues posed by setting aside a jury verdict. This is so because " '[l]itigants have a constitutional right to have issues of fact decided by the jury.' *Bambus* v. *Bridgeport Gas Co.*, 148 Conn. 167, 169, 169 A.2d 265 (1961)." ' *Zarrelli* v. *Barnum Festival Society, Inc.*, 6 Conn. App. 322, 326, 505 A.2d 25, cert. denied, 200 Conn. 801, 509 A.2d 516 (1986). Accordingly, a court should be hesitant to set aside a jury's verdict and must only do so when the jury verdict 'so shock[s] the sense of justice as to compel the conclusion that the jury was influenced by partiality, prejudice, mistake or corruption.' *Shea* v. *Paczowski*, 11 Conn. App. 232, 233, 526 A.2d 558 (1987). 'A court should be especially hesitant to set aside a jury's award of damages.' *Zarrelli* v. *Barnum Festival Society, Inc.*, supra. ' "The assessment of damages 'defies any precise mathematical computation'; *Floyd* v. *Fruit Industries, Inc.*, 144 Conn. 659,

675, 136 A.2d 918 (1957); and, therefore, establishing damages . . . is a task peculiarly within the expertise of a jury." ' *Zarrelli* v. *Barnum Festival Society, Inc.*, supra." *Creem* v. *Cicero*, 12 Conn. App. 607, 609-10, 533 A.2d 234 (1987).

In the case before us, the trial court found nothing in the evidence that indicated it should disturb the jury's verdict.[8] Neither do we. The evidence does not compel us to conclude that "the jury's award did not fall somewhere within the necessarily uncertain limits of just damages, or that it shocked the sense of justice. See *Zarrelli* v. *Barnum Festival Society, Inc.*, supra. 'Furthermore, a parsimonious jury award is not inadequate as a matter of law.' *Shea* v. *Paczowski*, [supra, 235]." *Biagioni* v. *Aetna Life & Casualty Ins. Co.*, 16 Conn. App. 690, 693, 549 A.2d 279 (1988).

There is no error.

In this opinion the other judges concurred.

STATE OF CONNECTICUT
APPELLATE COURT

No. AC 6758

ALFRED TRUMPOLD, ET AL.

V. : JULY 6, 1989

ROBERT J. BESCH, JR. ET AL.

ORDER

THE APPELLANT'S MOTION FOR REARGUMENT OR RECONSIDERATION HAVING BEEN FILED ON JUNE 20, 1989, AND
HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY O R D E R E D DENIED.

BY THE COURT,

[signature illegible]
ASSISTANT CLERK — APPELLATE

NOTICE SENT: 7-6-89
JACOBS, VOTRE & JACOBS
SACHS, DELANEY, MARETZ & ZEMETIS
GALLAGHER & GALLAGHER
HON. DONALD DORSEY
NEW HAVEN, (CV83-0218897)
REPORTER OF JUDICIAL DECISIONS

SUPREME COURT
STATE OF CONNECTICUT

NO. PSC-89-1017

Alfred J. Trumpold et al.

v.

Robert J. Besch, Jr. et al.

ORDER ON PETITION FOR CERTIFICATION TO APPEAL

On consideration of the petition by the plaintiffs for certification to appeal from the Appellate Court (18 Conn. App. 22), it is hereby ordered that said petition be, and the same is hereby denied.

BY THE COURT,

[signature illegible]
ASSISTANT CLERK — APPELLATE

Dated: September 27, 1989

Notice to: September 27, 1989

Clerk, Superior Court, New Haven
Clerk, Appellate Court
Gallagher & Gallagher
Sachs, Delaney, Maretz & Zemetis

Richard L. Jacobs in support of petition; *William F. Gallagher,* in opposition.

STATE OF CONNECTICUT
SUPREME COURT

NO. A.C. 6758

ALFRED J. TRUMPOLD ET AL.

V.

ROBERT J. BESCH, JR., ET AL. : OCTOBER 25, 1989

ORDER

THE MOTION OF THE PLAINTIFFS, FILED OCTOBER 10, 1989, FOR RECONSIDERATION HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY O R D E R E D DENIED.

BY THE COURT,

/s/ Francis J. Drumm, Jr.
CHIEF CLERK

NOTICE SENT: 10-25-89
JACOBS, VOTRE & JACOBS
SACHS, DELANEY, MARETZ & ZEMETIS
GALLAGHER, GALLAGHER & CALISTRO
CLERK, NEW HAVEN J.D.
CV83-0218897
HON. DONALD DORSEY

TRANSCRIPT OF OBJECTIONS TO LINDA TRUMPOLD'S VIDEO DEPOSITION, TAKEN JULY 8, 1987 AND SHOWN TO JURY ON JULY 21, 1987, PAGES 34-36.

MR. JACOBS: Now on page 128 —

THE COURT: 128?

MR. JACOBS: Yes, and 129 Mr. Zemetis is cross examining on the grounds of Mrs. Trumpold called before going to the police station on the day after this collision, which was six years ago today by the way, the collision, 7/21/81. But the question that Mr. Zemetis got into on page 128 —

THE COURT: "It was at that time that you got home that you called your father and you called the police department? Who else did you call?"

"I went to the hospital first.

All right. Who else did you call that night?

I called Mr. Besch.

Who else did you call beside Mr. Besch?

I don't remember calling anyone.

Did you call Mr. Jacobs that night or the day after?

It might have been the day after. I'm not sure, or the day after that."

What do you want?

MR. JACOBS: I want the reference to her calling a lawyer be stricken because certainly what she could have told her lawyer is not relevant and the fact that she told her lawyer — the fact that she told her lawyer, that she spoke to him at all is not relevant.

THE COURT: Then the next page is "You spoke with Mr. Jacobs before you went to see the police, did you?

Yes, I did."

MR. JACOBS: And I guess what the defense would like the jury to infer is that something was told to her, that there's something in that conversation. They can't speculate to what that conversation is and I think that —

THE COURT: "Now thereafter, after this accident you went to the World War II Memorial Hospital."

MR. JACOBS: Yes.

THE COURT: Okay. I'll leave that in.

MR. JACOBS: In other words the grounds of my objection, your Honor, is that it violates the attorney/client privilege because you could not ask Mrs. Trumpold "What did your attorney say to you?" "What did you say to your attorney?" but —

THE COURT: Of course not.

MR. JACOBS: That violates the privilege. On the other hand this question which he does ask about speaking with your lawyer is irrelevant.

THE COURT: It's cross examination, counsel, and I'll leave it in.

MR. JACOBS: And it is irrelevant —

THE COURT: I understand your objection.

MR. JACOBS: — because to bring this in court could serve no useful purpose when what follows cannot be inquired into other than to get the smell of something indecent, of some dishonorable conduct into the case and I think —

THE COURT: There's nothing dishonorable about calling your lawyer.

MR. JACOBS: Well there isn't and I don't think that any question is going to be asked which would let the inference arise that a person who calls their lawyer is doing the wrong thing or that something may have gone on between the lawyer and the client.

THE COURT: Well in the latitude allowed in cross examination on bias, prejudice is — well I'll let it in.

MR. JACOBS: Thank you, your Honor. Exception

U.S. CONSTITUTION —

AMENDMENT XIV

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.